Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-22

AIR FREIGHT HAULAGE CO., INC.,

Petitioner,

against

RYD-AIR, INC., AIR CARGO, INC., RYDER SYSTEM, INC., AMERICAN AIRLINES, INC., EASTERN AIRLINES, INC., NORTHEAST AIRLINES, INC., AIR CANADA, ALLEGHENY AIRLINES, INC., BRANIFF AIRWAYS, INC., BRITISH OVERSEAS AIRWAYS CORP., DELTA AIRLINES, INC., FLYING TIGER LINES, INC., MOHAWK AIRLINES, INC., NATIONAL AIRWAYS, INC., NEW YORK AIRWAYS, INC., NORTHWEST AIRLINES, INC., OZARK AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AVIATION, INC., AIRLIFT INTERNATIONAL, INC., SEABOARD WORLD AIRLINES, INC., SOUTHERN AIRWAYS, INC., TRANS WORLD AIR LINES, INC., UNITED AIR LINES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Air Freight Haulage Co., Inc. respectfully prays that a writ of certiorari issue to review the judgment entered in this antitrust case by the United States Court of Appeals for the Second Circuit, summarily affirming the judgment of the United States District Court for the Southern District of New York.

Opinions of the Courts Below

The order and judgment of the United States Court of Appeals for the Second Circuit (no opinion was issued) is reproduced in the Appendix at 1a and is not yet officially reported. The opinion and order of the United States District Court for the Southern District of New York (Lasker, J.) (not officially reported) is also reproduced in the Appendix at 3a and is reported at 1978-2 CCH Trade Cas. ¶ 62,321.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 6, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Was a *per se* violation of Section One of the Sherman Act committed when all domestic airlines entered into an industry-wide combination (without authorization by the Civil Aeronautics Board) to create a new trucking company, for the sole purpose of giving it the exclusive contract to perform air freight pick-up and delivery for all domestic airlines serving New York City, to the exclusion of Petitioner and all other truckers?

   A. Did Respondents' conduct constitute a horizontal group boycott and concerted refusal to deal that is *per se* illegal under this Court's prior decisions in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) and *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966)?

   B. Did Respondents' industry-wide fixing of uniform pick-up and delivery rates for all domestic airlines serving New York City constitute price-fixing, previously condemned by this Court. E.g., *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978)?

2. Was a relevant market of trucking for all domestic airlines in New York City (previously served by independent truckers under contracts administered by Air Cargo, Inc. (ACI), the CAB-authorized agent for all the airlines)—*viz.*, the ACI-airline contract trucking pick-up and delivery market—unlawfully monopolized, in violation of Sherman Act § 2 and Clayton Act § 7, when Respondent airlines first, granted an exclusive trucking contract to a new trucking company owned by all Respondents and, second, later directly took over such services through ACI, the airlines' wholly-owned instrumentality?

Statutes and Regulations Involved

Statutes:

15 U.S.C. §§ 1, 2 and 18 (Sections One and Two of the Sherman Act and Section Seven of the Clayton Act).

49 U.S.C. §§ 1382 and 1384 (Sections 412 and 414 of the Federal Aviation Act).

Each of the above is set forth in the Appendix (16a-18a).

Statement of the Case

Introduction

In an unprecedented industry-wide horizontal combination, all domestic airlines serving New York City, through their wholly-owned subsidiary—Air Cargo, Inc.—joined in 1970 with a major trucking company to form a new enterprise to which the airlines jointly gave one exclusive

contract to perform all pick-up and delivery of their air freight, excluding all independently owned truckers, such as Petitioner, who previously competed separately for such contracts with each airline. The airlines undertook such action on the premise that their conduct was immune from the operation of the antitrust laws by virtue of their regulation by the Civil Aeronautics Board (CAB). However, the airlines failed to disclose this combination to the CAB, as required by 49 U.S.C. § 1382 and were subsequently held not immune from antitrust liability. *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.*, 470 F. 2d 767 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973).

In the face of this industry-wide collective action and resultant price-fixing, the Second Circuit's summary affirmance of the District Court's judgment dismissing the complaint constitutes a serious erosion of well-established guidelines enunciated by this Court condemning such industry-wide collective activity as *per se* violations of Section One of the Sherman Act.

Statement of Essential Facts

The facts adduced at trial were undisputed. From 1947 until 1970, the airlines used Air Cargo, Inc. ("ACI") as their wholly-owned, nationwide "agent" in supervising and entering into contracts between each airline and various independent truckers to perform pick-up and delivery services for each airline. ACI's role, in this regard, was strictly limited by a CAB order, authorizing the creation of ACI, which limited ACI's role to that of *agent* for the airlines and strictly prohibited ACI's controlling rates.

As of 1970, there were several independent ACI truckers, including Petitioner, each serving several airlines in New York City. Each airline had an independent voice in the selection of its trucker, and, in fact, airlines occasionally switched truckers. An independent trucker, to perform trucking for an airline, had to obtain a contract from ACI, and would be known as an "ACI trucker." Whenever a shipper contacted an airline to ship air freight, that airline's ACI trucker would perform the pick-up and delivery work and would be paid, not by the shipper, but by the airline through ACI, which deducted an administrative service charge. The ACI trucker, thus, performed the trucking aspect of the airlines' air freight service.

In 1970, the airlines and ACI radically changed this practice. The airlines and ACI entered into an agreement to use one trucker exclusively for all the airlines serving the New York area. Petitioner and the other independent truckers were foreclosed from servicing *any* airline in the New York area.

The airlines through ACI agreed to join with Ryder Systems, Inc. ("Ryder")* to form a new corporation—called Ryd-Air—giving this ACI subsidiary an exclusive contract to perform all pick-up and delivery for all the airlines serving New York City. The exclusive contract was for a five-year term. The airlines guaranteed to give all their cartage work to Ryd-Air on a "cost-plus profit" basis.** At all times, ACI, the airlines' wholly-owned subsidiary, acted "as *agent* for and on behalf of the Air Carriers," as the Ryd-Air contract stated.

The result of this airline combination was that, after October 1970, no domestic airline serving New York City could choose as its trucker any company other than Ryd-Air. Price and service competition at the pick-up and delivery level were thus totally eliminated among all the airlines. Moreover, this collective action by all the airlines

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* Ryder was not previously involved in the air freight trucking business.

** The cost of this guarantee was passed on to the shipping public.

was coercively enforced, as evidenced by American Airlines' breach of a long-standing contract with Petitioner because of its "commitment" to, and obvious ownership interest in Ryd-Air. Petitioner, since 1970, has been unable to obtain any airline trucking business, as have all other truckers in the New York City area.

In 1973, ACI terminated Ryd-Air's contract and formed its own "New York Trucking Division" which continues, to this day, to operate as the exclusive trucker for all the airlines serving New York City.

Petitioner Air Freight Haulage Co., Inc. brought this action in 1971, claiming that the conduct of the Respondent airlines—together with ACI, Ryder and Ryd-Air—violated Sections One and Two of the Sherman Act and Section Seven of the Clayton Act.

During the course of proceedings below, Respondents moved for summary judgment on the ground that their CAB-regulated status immunized them from the operation of the antitrust laws. The District Court denied the motion, specifically holding, on the authority of *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.*, 470 F. 2d 767 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973)* that since specific authorization by the CAB had not been granted (or sought), the CAB had not immunized Respondents' activities. *Air Freight Haulage Co., Inc.* v. *Ryd-Air, Inc.*, 408 F. Supp. 446 (S.D.N.Y. 1976).

Trial was had to the District Court which, by opinion entered October 11, 1978, dismissed the complaint in its entirety.

Specifically, Petitioner claimed that the combination of all domestic airlines serving New York violated Section

* *Breen* considered the identical controversy (involving other plaintiffs) concerning the formation of Ryd-Air by the airlines, ACI and Ryder. After this Court denied certiorari, the plaintiffs in the *Breen* litigation settled with these Respondents.

One of the Sherman Act by creating a horizontal group boycott, whereby all the airlines collectively refused to deal with any outside trucker as their trucking agent except Ryd-Air—owned in part by ACI, which itself was the airlines' wholly-owned subsidiary.

Petitioner's claim of collective action was based on the indisputable fact that the airlines themselves made the agreement with Ryd-Air (using ACI as their "agent"*), that the CAB itself had limited ACI to act only as the wholly-owned *agent* of the airlines, and that, as ACI's General Counsel testified, ACI's action in forming Ryd-Air was taken at the *airlines'* direction. Respondents did not deny such collective action at trial. Rather, they admitted it. Indeed, on the eve of trial, the airlines (and ACI) made this statement:

> It was the *airlines* who demanded that the local motor carriers with whom ACI had contracted to provide pick up and delivery services in New York be replaced . . . and it was the *airlines* who ratified ACI's actions in contracting with Ryd-Air to provide pick-up and delivery services for the airlines at the New York City airports. Clearly, ACI acted as *agent for* the *airlines* in effecting the contract arrangements with Ryder and Ryd-Air.

(Pre-Trial Memorandum of Respondents Airlines and ACI, pp. 8-9; emphasis added).

The airlines further stated:

> The airline defendants and ACI will show at the trial of this case that ACI negotiated with Ryder as an agent of the airlines *and at the direction of the airlines.* Furthermore the defendant airlines and ACI

* It is beyond dispute that the actual trucking contract between ACI and Ryd-Air described ACI "as *agent for and on behalf of the Air Carriers.*" *See, Id.*, 408 F.Supp. 446, 448 n.3 (emphasis added).

will show at the trial that the airlines in fact knew the material facts involved in the formation of Ryd-Air and ratified its formation.

It must be remembered that the airlines own 100% of the stock of ACI and control the actions of ACI's management through a board of directors comprised of airline vice presidents.

Id., p. 14 (Emphasis in original).

Despite Respondents' own position that ACI acted *specifically* at the *direction* of the airlines, the District Court, without *any* factual basis, found that ACI acted independently in making the crucial decision to replace all existing independent truckers with Ryd-Air. Accordingly, the District Court rejected Petitioner's contentions that Respondents' actions were collective in nature and constituted a *per se* violation of Section One. Without explanation, the District Court made *no finding* on Petitioner's price-fixing claim, despite undisputed evidence of uniform price-fixing resulting from the Ryd-Air venture.*

On appeal to the United States Court of Appeals for the Second Circuit, a panel consisting of Circuit Judges Mulligan, Timbers and Van Graafeiland heard oral argument on April 2, 1979. On April 6, 1979, the Court of Appeals entered judgment affirming the District Court without opinion.**

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* Similarly, without explanation, the District Court made no findings at all with respect to Petitioner's claim of conspiracy to monopolize (15 U.S.C. § 2).

** Counsel for Petitioner is constrained to suggest that the issues raised by this antitrust case were not meaningfully reviewed by the panel of Judges of the Second Circuit that heard the appeal. The panel affirmed the judgment on the opinion of the District Judge. Since the District Judge did not even *decide* two of Plaintiff's claims (price-fixing and conspiracy to monopolize), the abruptness of this appellate determination, in light of the seriousness of the issues—dealing with an industry-wide combination—was indeed puzzling.

REASONS FOR GRANTING THE WRIT

POINT ONE

The combination of all the airlines, in forming their own exclusive trucking enterprise constituted a *per se* violation of Section One of the Sherman Act.

Introduction

The immunity from antitrust liability hitherto enjoyed by the airline industry has been described as the broadest ever granted any segment of American industry. As a general rule, the airlines, often agreeing among themselves to perform certain tasks in common or to create industry-wide standardization, submitted such agreements to the CAB for approval, and often for continued surveillance by the Board.* As a result of such regulation, the antitrust implications of the airline-ACI relationship to the air freight trucking market has, in the past, normally been shielded from judicial scrutiny by the Federal Aviation Act to the extent that CAB orders approved specific activities.**

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* Indeed, the 1947 CAB order approving the airlines' creation of ACI noted the Board's belief that "the future development of Air Cargo, Inc. is *uncertain* and . . . its activities may require future reconsideration of the approval granted herein." *Breen, supra*, 470 F. 2d at 774 n. 7 (emphasis added). Notably, on two occasions when the airlines sought CAB approval to expand ACI's activities, the CAB *refused* on antitrust grounds. See, e.g., *Local Cartage Agreement Case*, 15 C.A.B. 850, 854 (1952); *Air Freight Forwarder Investigation*, 21 C.A.B. 536, 625-26 (1955).

** Where agreements affecting air transportation were approved by the CAB, any person affected by such an order was automatically exempt from the operation of the antitrust laws (49 U.S.C. former § 1384), since the CAB, in approving such an agreement, is required to consider "the promotion of adequate . . . service by air carriers . . . without unjust discrimination . . . or unfair . . . competitive practices . . ." (49 U.S.C. § 1302). The

(footnote continued on following page)

Because of this immunity, predicated upon the regulated nature of the industry, there are few judicial decisions analyzing the anticompetitive effect of industry-wide agreements among airlines, such as the one in this case dealing with air freight trucking.* Thus, despite anticompetitive practices in their trucking activities, the airlines (and ACI) have sometimes been held immune from antitrust liability.** However, the Ninth Circuit Court of Appeals recently held that the airlines' trucking agent, ACI, was *not* immune from antitrust liability when, acting beyond the scope of its original authority, it involved itself in the actual organization of the trucking industry. *Jim Cain* v. *Air Cargo, Inc.* —— F.2d —— (9th Cir., June 26, 1979, Dkt. No. 77-1461).

In this case the airlines in New York departed dramaticaly from their past practice of having ACI merely supervise contracts between the airlines and independent truckers. Instead, the airlines themselves, using ACI as "agent", combined to form a new trucking company, Ryd-Air, taking a substantial ownership interest, and agreed to use this new enterprise as their exclusive trucker in New York City, excluding all independent truckers. This agreement, unlike previous airline trucking agreements, was never disclosed to the CAB, prompting the Court of Appeals to deny it exemption from the antitrust laws. *Breen Air Freight Ltd., supra.****

(footnote continued from preceding page)

standards governing such authority are taken from the antitrust laws themselves. *Hughes Tool Company* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 385 (1973). See new § 1384, effective October 24, 1978, and text, *infra* at p. 11.

* The Antitrust Division of the Justice Department has expressed the view that control over airline activities which are only incidental to air transportation is not a proper area for CAB regulation and immunity. Note, 39 J. Air Law & Commerce 453, 457n. (1973).

** *See, e.g., Scroggins* v. *Air Cargo, Inc.*, 534 F. 2d 1124 (5th Cir. 1976); *Big Bear Cartage, Inc.* v. *Air Cargo, Inc.*, 419 F.Supp. 982 (N.D. Ill. 1976).

*** Perhaps sensing vulnerability on the merits, the Respondents attempted on appeal below to reassert immunity from the antitrust laws, an argument plainly foreclosed by *Breen*.

In light of the nationwide importance of the airline-ACI trucking arrangement, this Court is respectfully urged to grant the writ to consider the application of traditional antitrust benchmarks of liability to evaluate the industry-wide conduct of the airlines. Such an evaluation will well serve the CAB and the airline industry since the Airline Deregulation Act of 1978 makes the granting of immunity *discretionary* with the CAB. Pub. L. 95-504, § 30(a); 49 U.S.C. § 1384 (reproduced in the Appendix at 18a).

A. Respondents' Conduct Constituted A Collective Refusal to Deal

This Court has long held that "the Sherman Act makes it an offense for [businessmen] to agree among themselves to stop selling to particular customers." *Kiefer Stewart Co.* v. *Seagram & Sons,* 340 U.S. 211, 214 (1951). Yet, the Ryd-Air venture accomplished precisely that, since all domestic airlines serving New York City agreed to refuse a trucking contract to any trucker other than Ryd-Air—their own creation. Petitioner and others whose "trade" was performing trucking for individual airlines were henceforth precluded from performing these services because of the airlines' agreement to use Ryd-Air on an industry-wide exclusive basis.

The Ryd-Air venture was far more pernicious than the restraint of trade condemned by this Court in *Klor's, Inc.* v. *Broadway Hale Stores, Inc.,* 359 U.S. 207 (1959), in which "a wide combination consisting of manufacturers, distributors and a [single] retailer" by mutual agreement, refused to sell to Klor's, another retailer. Even though the boycott of Klor's was engaged in by only one other retailer at Klor's level, this Court unanimously condemned such activity as a boycott and as *per se* illegal.*

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* This analysis under *Klor's* leaves aside, for the moment, the vertical integration resulting from *all* the airlines' wholly owning

(footnote continued on following page)

Notably, in this case, the District Court did not dispute that joint conduct by the airlines in terminating their ACI truckers (including Petitioner) would have constituted a *per se* restraint of trade under Sherman Act Section One. Rather, the Court unexplainably and without justification totally ignored the relationship between the airlines and ACI and decided the matter solely as a simple unilateral refusal to deal with the truckers by ACI, as though it were a separate entity—even though ACI's sole existence was as the airlines' *agent* and the Ryd-Air contract thus defined it. This finding, however, was clearly erroneous since Respondents below *admitted* their conduct was joint. Thus, Respondents' ACI and Ryder *agreed* to form Ryd-Air (Appellees' Brief p. 9), which action was authorized by ACI's Board (Id., pp. 9-10), which, in turn represented its airline owners (Id., p. 19 n.). Finally, the ACI-Ryd-Air contract itself, as well as Appellee's own Brief (p. 10), described ACI as "*agent* for . . . the Air Carriers".

The District Court apparently read the Second Circuit's recent decision in *Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) (en banc), *cert. denied*, 99 S. Ct. 340 (1978) (Justices Brennan, White and Blackmun dissenting), as controlling this case.* *Oreck*, however, was a single

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(footnote continued from preceding page)

ACI, which itself controlled Ryd-Air. Such horizontal industry-wide ownership of a vertically integrated entity but contributes to the trade-restraining nature of the Ryd-Air venture.

* While Petitioner does not regard *Oreck* as controlling, we note that the Circuits have split on the question of whether a *per se* violation is made out when a manufacturer (or a supplier) and a customer arrange together for the manufacturer or supplier to eliminate another customer in favor of the first. Compare, *Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979) with *Oreck*, *supra* and *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957). If the analogy to *Oreck* is controlling, then the split in Circuits should be resolved.

manufacturer-distributor termination case. See Comment, *Vertical Agreements to Terminate Competing Distributors*, 92 Harv. L. Rev. 1160 (1979). Petitioner does not dispute that each individual airline, acting *independently*, could legally have terminated any ACI trucker and substituted another. *United States* v. *Colgate*, 250 U.S. 300 (1919). However, the airlines—themselves competitors with each other for air freight business—could not legally agree to eliminate competition at the pick-up and delivery level by agreeing to do business with only one trucker of their mutual choice (and creation). This is because:

> "[T]he illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the [targets]."

St. Paul Fire & Marine Ins. Co. v. *Barry*, 438 U.S. 531, 545 (1978).

The airline combination was horizontal at two levels. First, at the airline level, each airline could not compete with all the others in the pick-up and delivery of air freight (both as to price and service). Such a result was illegal. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 611 (1972). Second, at the trucker level, although "the boycotters and the ultimate target need not be in a competitive relationship with each other," *St. Paul Fire and Marine Ins. Co., supra*, at 543 (collecting cases), the airlines and Ryder entered the truckers' market by creating a new trucking company, and through the exclusive ACI-Ryd-Air contract, prevented any other company from working as an airline trucker. The boycott of independent truckers was thus carried out by a combination of three levels of separate business entities—the airlines, ACI, and Ryd-Air. See *Klor's supra*, 359 U.S. at 213; L. Sullivan, *Antitrust*, 231 n. 1 (1977). However, unlike *Klor's*, this was more than a group boycott of *several* traders; it was effectively a cartel of the whole industry. See *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30 (1930); *United*

States v. *First National Pictures, Inc.*, 282 U.S. 44 (1930); Sullivan, *Antitrust* at 257 (1977).

The industry-wide collective action by the Respondents is not saved by its purported lack of an illegal motive.* Even though the District Court found that there was no "sinister anti-competitive intent," this Court has held in a group boycott case:

> "[W]here businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct."

United States v. *General Motors Corp.*, 384 U.S. 127, 146 (1966).

The airline combination in the Ryd-Air venture thus was a group boycott, or refusal to deal, because it constituted an organized industry-wide combination which deprived all other truckers from doing pick-up and delivery work for *any* domestic airline.

This Court is respectfully requested to examine this powerful combination of ACI and its airline owners, especially since the ACI-airline combination has continued to interfere with the trucking industry throughout the nation.

Indeed, in 1975, the airlines, through ACI, actively instigated the acquisition of one local trucking company by

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* The lack of anti-competitive motive on the part of the manufacturers and distributors in *Klor's* was irrelevant. As noted by the Fifth Circuit in *E.A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Committee*, 467 F.2d 178 (5th Cir.), *cert. denied*, 409 U.S. 1109 (1973).

> "Since the effect of the agreement was to drive Klor's out of competition with Broadway [another retailer], the Court found the three-cornered agreement illegal *per se* notwithstanding the fact that the manufacturers and wholesalers, not in competition with Klor's *probably had no such anticompetitive motive.*" (Id., 467 F.2d at 187) (Emphasis added).

another, for the alleged purpose of insuring that ACI's revenues be maintained and enhanced. *Jim Cain* v. *Air Cargo, Inc., supra.* The Ninth Circuit in that case reversed the District Court's granting of summary judgment in favor of ACI, and held that such conduct was not within the scope of the authority given by the CAB to ACI and the airlines. The Court stated:

> "In *Breen,* prior to awarding the contract, ACI *involved itself in the horizontal organization* of the freight-hauling industry by *affiliating* with Plaintiffs' competitor to establish its own trucking firm." *Jim Cain, supra* (typescript copy, p. 6).

ACI's expansions beyond mere supervision of contracts into actual involvement in the air freight trucking business in New York City (via the Ryd-Air venture) and in Los Angeles (by instigating acquisitions) are not isolated. As already noted, ACI itself took over the pick-up and delivery service in New York in 1973, by forming the "New York Trucking Division" of ACI—again without notifying the CAB. In 1978, the "New York Trucking Division"—an organ of all the airlines, designated *itself* as the trucker for all of the domestic airlines for Long Island, in the face of competitive "bids" for this contract by truly independent truckers. Likewise, throughout the nation ACI acts virtually dictatorially in cities where it can designate itself as the exclusive cartage agent for *all* airlines to the exclusion of all independent truckers. Once ACI does the pick-up and delivery for all the airlines in an area, it cannot help but eliminate rate and service competition among the airlines in the pick-up and delivery of air freight.

B. The Airlines Through the Ryd-Air Venture Engaged in Industry-Wide Price-Fixing of Pick-Up and Delivery Rates

By the formation of Ryd-Air, which became the exclusive trucking agent for all domestic airlines in New York City, Respondents directly fixed uniform industry-wide

prices to their shipping customers for the service of air freight trucking.

Prior to Ryd-Air's creation, the airlines could and did vary the prices charged to their customers for pick-up and delivery of air freight, since the cost to them was determined by the competitive interplay of free market forces resulting from the varying rates charged to them by independent truckers such as Petitioner.

Effective October 1, 1970—when Ryd-Air began its operations—price competition among the airlines was eliminated. Rates rose dramatically from $3.85 to $5.00 for minimum shipments and soon were raised yet another 20%—to $6.00, effective January 1, 1971. By December 1, 1971, the minimum again was raised to $6.60, once again with industry-wide price uniformity. And, since all the airlines were parties to the same "contract" with Ryd-Air, each airline was assured that none of its competitors could undercut it, either as to the rates charged or the services provided.

ACI's automatic power to raise rates for pick-up and delivery service during the Ryd-Air period• for *all* the airlines—a power hitherto forbidden by the CAB—was thus exercised to insure that the airline-stockholders of ACI did not lose money on Ryd-Air, which was guaranteed a profit.••

• This power was enhanced in 1973 when ACI itself directly took over the New York City pick-up and delivery operation as "the New York Trucking Division." By 1976, the minimum rates had almost tripled.

•• Incredibly, although ACI (which was required to file rate increases with the CAB) reported to the CAB at length the economic difficulties of its New York trucker—Ryd-Air—it studiously concealed the fact that it was was an *owner* of Ryd-Air. Rather, ACI described itself as dealing with "independent motor carriers." Furthermore, it conveniently omitted telling the CAB that Ryd-Air was *guaranteed* a 5% profit by the airlines.

As this Court only recently repeated:

> "Price is the 'central nervous system of the economy,' *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n. 59, 60 S. Ct. 811, 845, 84 L. Ed. 1129, and an agreement that, 'interefere[s] with the setting of price by free market forces' is illegal on its face. *United States* v. *Container Corp.*, 393 U.S. 333, 337, 89 S. Ct. 510, 512, 21 L. Ed. 2d 526."

National Society of Professional Engineers, 435 U.S. 679, 692 (1978).

The Ryd-Air venture's effect on price competition among the airlines was quite similar to, but far more egregious than that in *United States* v. *Sealy*, 388 U.S. 350 (1967), where the Sealy Company, owned by approximately thirty Sealy "licensees," manufactured and sold Sealy-named mattresses at pre-set prices. As the Court stated, "this flagrant and pervasive price-fixing . . . was . . . the activity of the *'stockholder representatives'* acting through and in collaboration with Sealy mechanisms. This underlines the horizontal nature of the enterprise, and the use of Sealy, not as a separate entity, but as an *instrumentality* of the individual manufacturers." *Id.*, 388 U.S. at 355-56 (emphasis added). ACI (and Ryd-Air) similarly were nothing but instrumentalities of their airline owners.

Unfortunately, the District Court did not rule on Petitioner's price-fixing claim and the Second Circuit's summary affirmance leaves the Court (and the industry) without any insight into its reasoning. Nevertheless, assuming that the District Court viewed the price-fixing conduct of Respondents as permissible under the Rule of Reason, such a holding is manifestly in error. Only last term, this Court made clear that even in the face of a purportedly noble reason for a restriction on price competition, any attempt at justification under the Rule of Reason is still restricted solely to a consideration of its

impact on competitive conditions. *National Society of Professional Engineers,* 435 U.S. 679, 688 (1978). Clearly, the instant case has the industry-wide control of prices by anticompetitive activities of the participants —ostensible competitors—that this Court enjoined in *National Society.*

POINT TWO

The relevant market is the service of pick-up and delivery for all the *Airlines* in New York City.

The District Court, in dismissing AFH's monopolization claim under Section Two of the Sherman Act* and its claim under Section Seven of the Clayton Act, based its decision upon a finding that the relevant service market consisted of "the ground transportation of air freight to and from the Metropolitan New York airports." (6a). The Court also found that "this service is provided, without significant differences, by air freight forwarders, independent contractors, house truckers, as well as ACI" *Id.*

Because the District Court analyzed the relevant market question from the viewpoint of *all potential* air freight *shippers,* rather than the viewpoint of the airlines who contract, through ACI, with truckers to offer a total door-to-door air freight service, Petitioner submits the District Court erred in dismissing Petitioner's monopolization claim.**

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* The District Court never decided Petitioner's claim of conspiracy to monopolize under Section Two.

** It is not necessary to assert that the District Court's specific findings of fact, or all of them, were "clearly erroneous" on the issue of relevant market. Rather, on an uncontroverted record, Petitioner submits that the District Court misapplied the appropriate legal standards, thereby compelling reversal. See *United States* v. *Connecticut National Bank,* 418 U.S. 656, 666 (1974).

The factual difficulty apparently encountered by the District Court was that shippers of air freight have other means, besides the ACI truckers, of getting their freight to the airline cargo terminals at the airports. Thus, air freight forwarders, independent (non-ACI) truckers and house truckers (working for a given shipper), deal directly with shippers. The ACI trucking service, on the other hand, is a trucking service provided under contract to the *airlines,* who included this service in *their* door-to-door air freight service to shippers.

The actual carriage of goods by air is, in all instances, performed by CAB-certified airlines. However, very distinct (and separately regulated) boundaries divide the different trucking services which cart goods to the airport. Air freight forwarders, which handle the majority of air freight and are denominated by the law as "indirect air carriers," consolidate shipments of their various shippers to achieve bulk rates, and arrange for consolidated shipments to be flown by a direct air carrier—an airline. An air freight forwarder also assumes total responsibility to the shipper to whom it issues its own air waybill for the shipment door-to-door, providing its own pick-up and delivery service.

When an airline makes a "door-to-door" contract with a shipper, the airline issues its *own* air waybill and delegates the pick-up and delivery task to its ACI trucker, which has no direct relationship with the shipping public, acting instead solely as the airline's agent.

While air freight forwarders and truckers might have individual contracts with shippers, the ACI truckers' customers are, in fact, the *airlines* not the shippers. Indeed, the ACI truckers are paid by the airlines, through ACI. The ACI trucker's geographic jurisdiction and schedules are set by the airlines and ACI pick-up and delivery rates are filed with the CAB by the airlines.

Finally, the ACI trucking service alone provides for door-to-door liability by the airline for the shipment. The ACI trucker picking up the shipment, as agent for airlines, executes an air waybill for the airline—an authority not given other truckers or forwarders. This airline liability for shipments carried by the ACI trucker is regulated by the CAB.

The ACI trucker, as the airline's *agent,* is in essence, providing a dual service primarily to its airline, which requires a trucker to pick-up and deliver shipments it contracted for directly with shippers—but also to the shipper itself, which needs a method of transporting freight to the airport, but which deals with the airline alone in obtaining such service.

Petitioner asserted that the ACI trucking market was monopolized by the airlines and Ryd-Air. Indeed, the District Court noted that, on Petitioner's theory of relevant market, it is "inescapable that ACI has a monopoly".* Nevertheless, the District Court ignored the dual nature of the service provided by airline truckers and chose a relevant market viewpoint of all potential shippers. This was clearly incorrect. *Cass Student Advertising, Inc.,* 516 F.2d 1092 (7th Cir. 1975), *cert. denied,* 423 U.S. 986 (1976).

Cass dealt with a service industry consisting of the sale of advertising space in college newspapers to national

* The District Court apparently viewed the relevant market question as dispositive of *all* Petitioner's claims (including Section One of the Sherman Act), since it stated:

> "I believe that the case should be approached—the decider of the case should approach it first from the point of view of determining what the relevant market is.
>
> "We don't need to get to the question of immunity, for example, if the relevant market is not what the plaintiff contends it is. If I decide that the plaintiff is correct in that regard, then we certainly have to get to the immunity question because by definition it seems almost inescapable that ACI has a monopoly of the market which is the relevant market."

advertisers. Plaintiff Cass charged that defendant National, which represented over eighty percent of the college newspaper business largely through exclusive contracts, had monopolized this market. National was the exclusive representative of the newspapers it served in soliciting advertising from national advertisers. The District Court in *Cass* noted that the service of the defendant National was only one method by which national advertisers could reach college students—since college newspapers are *theoretically* in competition with other types of newspapers, television, and all other media. The District Court thus concluded that national advertisers had significant alternatives to college newspapers for reaching the college student market and concluded that the relevant market was "all modes of communication used to present national advertising to college students" rather than the narrower market suggested by plaintiff: ("the market for representing college newspapers in the placement of national advertising").

The Seventh Circuit reversed,* relying on the principles of *United States* v. *E.I. DuPont de Nemours & Co.,* 351 U.S. 377 (1956), and the submarket principles of *Brown Shoe* v. *United States,* 370 U.S. 394 (1962). The Seventh Circuit noted that the District Court had misunderstood the "dual nature" of the services offered by Cass and National. By viewing only the national advertisers as "buyers" of the service—and ignoring the fact that the college newspapers were also "buyers" of the service—the District Court incorrectly chose an overly large relevant market.

The Court of Appeals observed that, in the context of the factual situation in *Cass,* "it may not be easy for a Court to choose one of the 'end' parties as the sole purchaser of the middleman's services" (*Id.,* 516 F.2d at 1098) but concluded that:

> "It is conceivable that both end parties in a middle-

* The late Mr. Justice Clark sat on the panel.

man market could be purchasers of the middleman's services. In such cases, two relevant market determinations might be necessary. For example, if this case were viewed as a dual purchaser case, the district court's opinion would represent a finding that [National] has no market power with respect to its national advertiser customers. The question would remain open whether [National] has market power among the other purchasers of its services, college newspapers seeking national advertising. It would therefore be possible for a middleman to lack the requisite market power in one direction while achieving a *complete stranglehold in the other direction.*

Id., 516 F.2d at 1098-99 (Emphasis added).

The Court then went on to note that National's primary relationship began, and continued, with the college newspapers, with which it made "exclusive arrangements" and by which it was paid. Applying the submarket indicia of *Brown Shoe,* the Court of Appeals found that the business of providing representation was a "specialized vendor," that the college newspapers were "distinct customers," that there was "industry recognition of the submarket," and "distinct prices." *Id.*, 516 F.2d at 1099-1100.*

In the instant case, the District Court failed to make just such an analysis. First, since ACI truckers work under contract *for the airlines,* the airlines themselves are the "distinct customers" of the ACI truckers, who are prohibited from soliciting air freight trucking for themselves.* Second, distinct prices" are charged by the ACI truckers, to ACI, which then billed the airlines. "Public recognition of the submarket" is present, since ACI truckers, required to paint their trucks with the ACI logo become "agents" of the airlines, and are not permitted to solicit business on their own.

* The Court also relied on *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *International Boxing Club, Inc.* v. *United States,* 358 U.S. 242 (1956); and *United States* v. *Connecticut National Bank, supra*—all of which rejected assertions of a large market based on the supposed interchangeability of products or services offered.

The District Court, viewing the "relevant market" from the *shippers'* viewpoint, thus ignored the real customer of ACI trucking—the airlines themselves.

In surveying the difficulty of choices in the relevant market analysis, a court

> "would be remiss in selecting between two otherwise appropriate product markets that one which, on analysis, will not reflect the full brunt of any and all anticompetitive effects . . ."

United States v. *Crowell, Collier & McMillan,* 361 F.Supp. 983, 1002 (S.D.N.Y. 1973) (Tyler, J.).

Such an admonition is appropriate in this case, where Sherman Section Two and Clayton Section Seven claims are clearly applicable to this unprecedented industry-wide combination and monopoly by all domestic airlines serving New York.

In analyzing the markets present here, two principal modes of door-to-door air freight service under an air waybill are available: either under that of a direct air carrier (the airline) or that of an indirect air carrier (the air freight forwarder), each separately defined and licensed under statute and regulations by the CAB. The airlines' door-to-door service required a trucking com-

* Notably ACI, the airlines' contracting agent, was the subject of specific CAB regulation. As this Court has noted, an antitrust market should "normally be defined by reference to the existing regulatory framework." *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 642 (1974).

ponent, which, in New York City, was totally pre-empted by the airlines' own exclusive trucker, airline-owned, profit-guaranteed and interlockingly directed. It follows that, however denominated, the exclusive handling of air freight in New York for *all* of the domestic airlines, by a single airline-owned and controlled trucker, giving no access to other truckers, is an illegal monopoly of a discrete submarket. Legitimizing the airlines' conduct in New York can only have serious implications for the rest of the nation.

Summary

The Second Circuit's countenancing of the industry-wide collective refusal to deal embodied in the Ryd-Air venture together with the total fixing of uniform rates, is a serious departure from the *per se* standards of liability established by this Court in the above-cited cases. Certiorari should be granted to ensure that the continuing industry-wide illegal actions of the Respondents in New York and nationwide are dealt with by the Courts.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Dated: New York, New York
July 5, 1979

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of April, one thousand nine hundred and seventy-nine.

Present: Hon. William H. Mulligan
Hon. William H. Timbers
Hon. Ellsworth A. Van Graafeiland
Circuit Judges.

78-7557

AIR FREIGHT HAULAGE CO., INC.,

Plaintiff-Appellant,

against

RYD-AIR, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and it hereby is affirmed on the opinion below of the Hon. Morris E. Lasker, 1978-2 CCH Trade Cas. ¶ 62,321 (S.D.N.Y. Oct. 10, 1978).

s/ WILLIAM H. MULLIGAN
William H. Mulligan

s/ WILLIAM H. TIMBERS
William H. Timbers

s/ ELLSWORTH A. VAN GRAAFEILAND
Ellsworth A. Van Graafeiland

Filed: April 6, 1979
United States Court of Appeals
A. Daniel Fusaro, Clerk

Opinion of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civ. 3428

AIR FREIGHT HAULAGE CO., INC.,

Plaintiff,

against

RYD-AIR, INC., AIR CARGO, INC., RYDER SYSTEM, INC., AMERICAN AIRLINES, INC., EASTERN AIRLINES, INC., NORTHEAST AIRLINES, INC., AIR CANADA, ALLEGHENY AIRLINES, INC., BRANIFF AIRWAYS, INC., BRITISH OVERSEAS AIRWAYS CORP., DELTA AIR LINES, INC., FLYING TIGER LINES, INC., MOHAWK AIRLINES, INC., NATIONAL AIRWAYS, INC., NEW YORK AIRWAYS, INC., NORTHWEST AIRLINES, INC., OZARK AIR LINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AVIATION, INC., AIRLIFT INTERNATIONAL, INC., SEABOARD WORLD AIRLINES, INC., SOUTHERN AIRWAYS, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC.,

Defendants.

LASKER, D. J. Since 1947, Air Cargo, Inc. (ACI), has provided terminal and cartage services on behalf of a large number of airlines operating in the United States. From 1957 until 1970, it employed Air Freight Haulage as one of its cartage agents in the New York City area. In 1970, ACI terminated its contracts with Air Freight and its two other agents in New York City, Breen Air Freight, Ltd., and Mercury Air Freight, Inc., and, together with Ryder Systems, Inc., formed a new entity, Ryd-Air, to take over the pickup and delivery of air

freight in this area. This arrangement lasted until October of 1973, when ACI terminated its contract with Ryd-Air and began to conduct its own direct pickup and delivery service in New York City.

In or about 1971, Breen and Air Freight Haulage brought separate suits against the defendants charging them with violations of the antitrust laws. In the *Breen* case, the defendants moved to dismiss on the ground that the Civil Aeronautics Board had primary jurisdiction over the dispute and that the operations of ACI were immunized from the antitrust laws under the exception contained in § 414 of the Federal Aviation Act, 49 U. S. C. § 1384. The motion was denied and the denial was affirmed on appeal. 470 F. 2d 767 (2d Cir. 1972). In the case at hand the parties made cross-motions for summary judgment, both of which were earlier denied. Defendants' motion was denied on the authority of *Breen;* plaintiff's because of residual factual disputes. Although in their pretrial memoranda and at trial both parties laid considerable emphasis on factual matters relating to the immunity of the defendants from the antitrust laws, we do not determine that question because we find that the plaintiff has not established by a preponderance of the evidence that the defendants have violated Sections 1 or 2 of the Sherman Act or Section 7 of the Clayton Act.

Air Freight charges the defendants with conspiring to monopolize and unreasonably restraining trade in the trucking of air freight to and from New York City's major metropolitan airports in violation of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 & 2, and Section 7 of the Clayton Act, 15 U. S. C. § 18. Trial was had to the court, and we now make the following findings of fact and conclusions of law.*

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* The findings of fact stipulated to by the parties are contained in the Appendix to this opinion.

ACI concluded its contractual relationship with Air Freight Haulage, Breen and Mercury because, by the spring of 1969, it was experiencing severe problems with its pickup and delivery service in New York's Area A. A large number of hijackings and truck heists had taken place, (Bernhard, 262; Champley, 664; Miller, 817); claims ratios almost doubled in a brief period and ACI incurred serious deficits (Bernhard, 262; Miller, 817). Officials at several of the airlines were "fed up" with the service (Miller, 817), and found it "far, far below standard" (Milton, 737). ACI felt that the service lacked "the proper image" and was not "according to [its] contractual service requirement" (Champley, 584). ACI therefore decided to replace its current contractors with the legitimate business purpose of improving the quality of its pickup and delivery service.

ACI solicited proposals from "about every trucker in the telephone directory in New York" (Bernhard, 349) to replace its existing service but found none of the proposals satisfactory (Bernhard, 349-50; Champley, 593-94). At a meeting on March 12, 1970, the ACI Board of Directors decided to ask Ryder Systems, Inc., to submit a proposal to take over the pickup and delivery service in Area A. (Miller, 819) Later that spring, after ACI's management concluded that it was not feasible for ACI itself to take over the pickup and delivery service (Exhibit 7), the ACI Board of Directors decided to accept a proposal by Ryder to form a subsidiary, Ryd-Air, to perform the service (Miller, 819; Exhibit 7). On June 30, 1970, ACI entered into an agreement with Ryd-Air under which Ryd-Air agreed, commencing October 1, 1970, to provide pickup and delivery service for the airlines in New York's Area A on a cost plus 5% basis. (Exhibit 30) Under an agreement with Ryder, ACI received a 20% stock interest in Ryd-Air and the right to elect two di-

rectors to the Board of Directors of Ryd-Air. (Miller, 820; Exhibit 88).

The contract between ACI and Ryd-Air provided that ACI and the air carriers reserved the right "to employ additional parties to compete with Contractor [Ryd-Air] in providing pickup, delivery and transfer services for all or any part of the air freight traffic moving between the points covered by this Contract . . ." (Exhibit 30).

Ryd-Air consistently lost money while it acted as ACI's contractor (Bernhard, 448-50; Pelletier, 1105) and experienced a lower volume than the ACI contractors it replaced (Champley, 643). Because ACI found the service provided by Ryd-Air costly and unsatisfactory, ACI terminated its contract with Ryd-Air on October 1, 1973, and since then has conducted, through its New York City Trucking Division, its own pickup and delivery service to the metropolitan New York airports from Area A.

The court makes the following findings of fact on the issue of relevant market:

The parties agree that the relevant geographic market is Area A of New York, which consists of the boroughs of the Bronx, Brooklyn, Manhattan and Queens.

The relevant product market in this case is the ground transportation of air freight to and from the metropolitan New York airports. The testimony establishes that this service is provided, without significant differences, by air freight forwarders, independent contractors, house truckers, as well as ACI. A comparison of the alternatives indicates that the following substantial similarities exist between the services provided by the various carriers:

a. A shipper in Area A can ship to the airport by house trucker, independent trucker (Hood, 860), freight forwarder or by ACI (Groves, 996-997).

b. A shipper in Area A can procure door-to-door service whether he uses an air freight forwarder, an independent trucker, his own house trucker, or an ACI contractor (Cirami, 193; Groves, 1051, 1074; Hood, 840, 861).

c. An air freight shipment is likely to arrive at its destination at approximately the same time, regardless of whether the shipment is made through an air freight forwarder, an independent trucker, a house trucker, or ACI (Groves, 1002-04).

There is no evidence that the cost of shipment is greater whether the shipment is made through a forwarder, independent, house trucker or ACI. There is no evidence that the shippers in Area A, in practice, prefer the services of the ACI contractor to those of any other carrier. To the contrary, the credible testimony establishes that ACI competes for customers with air freight forwarders, house truckers, and independent truckers (McQuade, 545; Miller, 817, 822-23; Groves, 995-96, 1071; Hood, 860, 865, 878; Smick, 979; Exhibit 33) and that there is cross-elasticity of demand between ACI's services and those of the other carriers. For example, T. M. Miller, a former director of ACI, testified that when the ACI contractors' service was deteriorating in the late 1960s, ACI was "losing substantial business to forwarders and other carriers . . ." (Miller, 817) and Mr. George L. Groves, the President of ACI, testified that, since 1968, ACI has steadily lost business as its prices have gone up. We credit this testimony: indeed, there is no evidence to the contrary. Accordingly, on the basis of the evidence described above, we conclude that the relevant product market consists of the services of air freight forwarders, house truckers, independent truckers and the ACI contractor in Area A.

The credible testimony establishes that from 1968 until 1977, the ACI contractors' share of the relevant domestic market never rose above 10.1%, which it achieved in 1969.

In 1977, their share of the domestic market was 5.4%. The ACI contractors' share of the combined domestic and international market during the same period reached a high of 6.4% in 1968. In 1977, ACI's share of this market was 2.6% (Groves, 1007-09; Exhibit E).

The barriers to entry in the air freight pickup and delivery business in the relevant market are extremely low. All that is necessary to enter the business is a truck and a driver (Groves, 1022-23; Cirami, 117-18, 175).

Air Freight Haulage has not established that the defendants are guilty of an illegal combination or conspiracy in restraint of trade in violation of Section 1 of the Sherman Act. The plaintiff contends that the airlines jointly decided to terminate the three ACI contractors and to form Ryd-Air with Ryder Systems, thereby engaging in a horizontal combination to restrain trade which would constitute a *per se* violation of Section 1. Although there was some testimony that individual airlines were dissatisfied with the service provided by the prior ACI contractors (Air Freight Haulage, Breen and Mercury), there is no evidence that the airlines, collectively, decided to terminate such contractors. Rather, the evidence establishes that ACI, the airlines' independent subsidiary, was responsible both for the initial decision to replace the contractors with Ryd-Air and the subsequent decision to provide direct pickup and delivery service. Indeed, Air Freight Haulage itself attempted to prove at trial, during the examination of Mr. Lambert (Lambert, 557) and Mr. Miller (Miller, 825), that ACI alone was responsible for replacing the earlier service in order to refute the contention of the defendants that the airlines supervised and ratified the decision and thus immunized the actions from the operation of the antitrust laws. (See *Breen Air Freight v. Air Cargo, Inc.*, 470 F. 2d 767 (2d Cir. 1972)).

Since there is no evidence that the airlines engaged in a horizontal restraint of trade but only that ACI decided to

change its pickup and delivery service with the help of Ryder Systems, the plaintiff's argument that a *per se* violation of the antitrust laws is involved fails. In this case, as in those involving the replacement of a distributor by a single manufacturer, the actions in dispute should be tested in light of their anticompetitive purpose or effect. See *Oreck Corporation v. Whirlpool Corporation and Sears, Roebuck & Co.*, 1978-1 CCH TRADE CASES, ¶ 62,026 (2d Cir. 1978); *Ace Beer Distributors, Inc. v. Kohn, Inc.* 318 F. 2d 283 (6th Cir. 1963).

The testimony at trial indicates that ACI terminated its contracts with Air Freight Haulage, Breen and Mercury not out of any "sinister anticompetitive intent", *Bushie v. Stenocord Corp.*, 460 F. 2d 116, 120 (9th Cir. 1972), but only to improve the quality of its pickup and delivery service. There is no evidence that competition has lessened among suppliers of pickup and delivery service in Area A since 1970. To the contrary, the evidence at trial indicated that competition in this market is healthy and that ACI's share has actually decreased since the formation of Ryd-Air. Moreover, Air Freight Haulage, even though it is no longer one of ACI's exclusive agents, remains a competitor in the market. Accordingly, we find that plaintiff has not established that ACI's termination of Air Freight Haulage, Breen and Mercury had an anti-competitive purpose or effect in violation of Section 1 of the Sherman Act.

Air Freight Haulage has failed to establish that ACI's use of Ryd-Air for pickup and delivery service and ACI's subsequent independent operation constituted monopolization or an attempt to monopolize in violation of Section 2 of the Sherman Act or that this conduct substantially lessened competition or tended to create a monopoly in violation of Section 7 of the Clayton Act.

To establish monopolization, it must be proven that the defendants posseassed monopoly power in the relevant

market and that this power was "willfully acquired" rather than a natural development as a result of "a superior product, business acumen or historical accident." *United States v. Grinnell Corp.*, 384 U. S. 563, 570-71 (1966). The Supreme Court defines "monopoly power" as the "power to control prices or exclude competition" and the "relevant market" to include "commodities reasonably interchangeable by consumers for the same purposes." *United States v. E. I. duPont de Nemours & Co.*, 351 U. S. 377, 395 (1956). As stated above, the evidence establishes that the services of air freight forwarders, independent truckers, house truckers and ACI are "reasonably interchangeable" services available to shippers in Area A. The type of service provided by all four types of carriers is substantially the same; there is no evidence that one possesses a cost or service advantage over the other; and there is substantial evidence that ACI competes for customers with the other three carriers and has suffered from price and service competition from them in the past.

Although Air Freight Haulage argues that ACI's pickup and delivery service constitutes a submarket for purposes of the antitrust laws, there is no evidence that the characteristics of a submarket, as set out in *Brown Shoe v. United States*, 370 U. S. 294, 325 (1962), are present here. Thus the plaintiff has failed to show that ACI's service enjoys "industry or public recognition" as a submarket, "peculiar characteristics and uses, distinct customers" or "distinct prices".

There is no evidence that the defendants possess monopoly power in this market. The testimony on market share establishes that, during the last ten years, ACI has possessed, at most, only 10.1% of the domestic market for ground transportation of air freight in Area A and, in 1977, possessed only 5.4% of this market. These figures do not alone support an inference that ACI has the ability to "exclude competition" or "control prices" within the

market, and, in the absence of any other evidence in support of this contention, we reject the claim of monopolization.

The plaintiff has also failed to establish an attempt to monopolize in violation of Section 2 of the Sherman Act. To prevail on such a claim, it is necessary to prove that the defendants have the "specific intent to destroy competition or build monopoly", *Times-Picayune v. United States*, 345 U. S. 594, 626 (1953), and a "dangerous probability of success", *Lorain Journal v. United States*, 342 U. S. 143, 153 (1952); *Swift & Co. v. United States*, 196 U. S. 357, 396 (1905); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F. 2d 1019, 1030 (2d Cir. 1976); *Bowen v. New York News, Inc.*, 522 F. 2d 1242, 1252 n. 7 (2d Cir. 1975). The testimony establishes that ACI terminated its contracts with Air Freight Haulage, Breen and Mercury because it was dissatisfied with the quality of service they were providing and not as a result of any anti-competitive motive. Moreover, the testimony on market share indicates that, even if the defendants did have the requisite intent, they were so far from achieving a monopoly as to preclude a finding of "dangerous probability of success", the second part of the test for attempt. Accordingly, this claim is also rejected.

Finally, there is no evidence that the formation of Ryd-Air substantially lessened competition or tended to create a monopoly in violation of Section 7 of the Clayton Act. Indeed, the creation of Ryd-Air can be said to have increased competition in the market since it added a new carrier to the field while the former ACI contractors, Air Freight Haulage, Breen and Mercury, remained in business. The cause of action is therefore dismissed.

For the reasons stated above, the plaintiff's complaint is dismissed in its entirety.

It is so ordered.

Dated: New York, New York
October 10, 1978

s/ Morris E. Lasker
U.S.D.J.

Appendix

Under the pre-trial order herein dated March 31, 1977, the parties have stipulated that the following facts are not in dispute:

(1) Air Cargo, Inc. ("ACI") was incorporated in 1941 in Delaware by several airlines. In 1943, the activities of ACI were discontinued and it was preserved by its stockholders as a mere paper corporation.

(2) On March 1, 1947, seventeen airlines entered into an agreement entitled "Agreement Among Certain Air Carriers Relating to Air Cargo Services," which agreement (hereinafter the "ACI Agreement") provided for the reactivation of ACI. ACI is wholly owned by the domestic airlines who own varying amounts of ACI stock. The largest stockholders are American Airlines, Inc., Trans World Airlines, Inc., United Air Lines, Inc., Eastern Airlines, Inc., and Delta Air Lines, Inc.

(3) The ACI Agreement was filed by the airlines with the Civil Aeronautics Board on April 14, 1947.

(4) The Civil Aeronautics Board officially designated the ACI Agreement as "Agreement C. A. B. No. 1041." On December 31, 1947, the Civil Aeronautics Board approved the ACI Agreement by its Order Serial Number E-1086 pursuant to the provision of Section 412(b) of the Civil Aeronautics Act, which section required the Board to either approve or disapprove an agreement so filed.

(5) Five amendments to C. A. B. No. 1041 were also filed with the Civil Aeronautics Board, and each has been approved by the Board, Amendments 1 and 2 by Order Serial No. E-6913, dated October 24, 1952; Amendment 3 by Order Serial No. E-9532 on August 30, 1955; Amendment 4 by Order Serial No. E-22044 dated April 6, 1965; and Amendment 5 by Order 75-6-37 dated June 6, 1975.

(6) The initial undertaking by ACI toward implementation of the duties assigned to it by the airlines under Agreement C. A. B. No. 1041 was to prepare a standard form "Service Contract" to be used by ACI at each airport city for contracting with a local trucking company to perform air freight pickup and delivery service for the airlines serving that city.

(7) Salvatore Cirami, d/b/a Air Freight Haulage Co., first acted as an ACI contractor serving one or more of the domestic airlines in the metropolitan New York City area at JFK International, LaGuardia and Newark airports in 1957. After the incorporation of plaintiff Air Freight Haulage Co., Inc., a New York corporation, it succeeded, with the approval of ACI to the company's contracts, and continued the pickup and delivery of air freight for one or more domestic airlines at these airports until October 1, 1970.

(8) A Service Contract, between ACI and Salvatore Cirami, d/b/a Air Freight Haulage, Co., dated May 1, 1957, and applicable to services in the New York City area was filed with the C. A. B. along with other Service Contracts. The Board assigned to that Service Contract the designation "Agreement C. A. B. No. 10981." On August 9, 1957, by its Order Serial No. E-11546, the Board approved the Service Contracts so filed, including Agreement C. A. B. No. 10981 between Air Cargo, Inc. and Salvatore Cirami.

(9) In 1958, a short-form Service Contract between ACI and Salvatore Cirami, d/b/a Air Freight Haulage Co. dated December 1, 1958, and assigned "Agreement C. A. B. No. 12708," was filed. The Board approved that Service Contract and four subsequent amendments thereto (C. A. B. Order Nos. E-13601, E-14052, and E-15278).

(10) In 1960, the standard-form Service Contract was again amended. A new Service Contract between Salvatore Cirami, d/b/a Air Freight Haulage Co., and ACI applicable to New York City was filed with the Board and assigned Agreement C. A. B. No. 14470, and was approved by the Board on August 26, 1960 (Order No. E-15700).

(11) The Board, effective March 8, 1962, dispensed with the requirements that agreements between certificated route air carriers or indirect air carriers on the one hand and surface motor carriers on the other hand for pickup and delivery of property be filed under Section 412 of the Act. CAB Economic Regulations, § 289.3 (14 C. F. R. Part 289).

(12) In addition to the ACI contract with Air Freight Haulage Co., Inc. for pickup and delivery services in New York City, ACI also throughout the same period had such standard-form Service Contracts with two other local motor carriers for such services in New York City—Mercury Air Freight and Breen Air Freight.

(13) The Economic Regulations of the Civil Aeronautics Board require that all rates and charges for pickup, delivery, and transfer services provided by the airlines for the public be published in tariffs filed with the Board (14 C. F. R. Parts 221.102 and 222.2). The rates so published consist of two elements: first, the rate paid to the contractor under the Service Contract, and second, the administrative service charge of ACI.

(14) At a meeting of the Board of Directors of ACI on April 28, 1970, the Directors voted to enter into an agreement with Ryder System, Inc. in which a new subsidiary corporation would be formed to conduct pickup and delivery services of air freight in New York City Area A. The subsidiary created, called Ryd-Air, Inc., was created with Ryder System owning 80% of the outstanding stock and ACI owning the remaining 20%, and with ACI designating 2 of the 5 directors. The agreement also called for Ryd-Air, Inc. to be paid for the services on a cost plus 5% basis.

(15) The new service in New York City by Ryd-Air was to commence October 1, 1970. On or about April 29, 1970, ACI served written notices of contract termination upon the three ACI contractors in New York City (Air Freight Haulage, Mercury and Breen).

(16) On June 30, 1970, ACI entered into ACI's standard-form contract with Ryd-Air for the air freight cartage services in New York City Area A commencing October 1, 1970.

(17) Ryd-Air commenced operations on October 1, 1970. In the summer of 1972, ACI proposed to Ryder System that ACI take over the management of Ryd-Air on October 1, 1972, and eliminate the 5% management fee. This proposal was accepted by Ryder System. On October 1, 1973, ACI terminated its pickup and delivery contract with Ryd-Air and commenced its own direct operation on that date, which operation by ACI has continued to the present.

Statutes.

Section One of the Sherman Act (in part), 15 U.S.C. § 1.

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

Section Two of the Sherman Act, 15 U.S.C. § 2 (in effect in 1970).

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section Seven of the Clayton Act, 15 U.S.C. § 18.

§ 18. Acquisition by one corporation of stock of another

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

. . .

Section 412 of the Federal Aviation Act, 49 U.S.C. § 1382 (in effect in 1970)

§ 1382. Pooling and other agreements; filing; approval by Board

(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in

violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

Former Section 414 of the Federal Aviation Act, 49 U.S.C. § 1384 (in effect in 1970)

§ 1384. Legal restraints

Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

Present Section 414 of the Federal Aviation Act, 49 U.S.C. § 1384 (effective October 24, 1978)

§ 1384. Antitrust exemption

In any order made under section 1378, 1379, or 1382 of this title, the Board may, as part of such order, exempt any person affected by such order from the operations of the "antitrust laws" set forth in subsection (a) of section 12 of Title 15 to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and those transactions necessarily contemplated by such order, except that the Board may not exempt such person unless it determines that such exemption is required in the public interest.

Supreme Court, U. S.
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AUG 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-22

AIR FREIGHT HAULAGE CO., INC.,

Petitioner,

against

RYD-AIR, INC., AIR CARGO, INC., RYDER SYSTEM, INC., AMERICAN AIRLINES, INC., EASTERN AIRLINES, INC., NORTHEAST AIRLINES, INC., AIR CANADA, ALLEGHENY AIRLINES, INC., BRANIFF AIRWAYS, INC., BRITISH OVERSEAS AIRWAYS CORP., DELTA AIRLINES, INC., FLYING TIGER LINES, INC., MOHAWK AIRLINES, INC., NATIONAL AIRWAYS, INC., NEW YORK AIRWAYS, INC., NORTHWEST AIRLINES, INC., OZARK AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AVIATION, INC., AIRLIFT INTERNATIONAL, INC., SEABOARD WORLD AIRLINES, INC., SOUTHERN AIRWAYS, INC., TRANS WORLD AIR LINES, INC., UNITED AIR LINES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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August 2, 1979

In the

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-22

Air Freight Haulage Co., Inc.,

Petitioner,

against

Ryd-Air, Inc., Air Cargo, Inc., Ryder System, Inc., American Airlines, Inc., Eastern Airlines, Inc., Northeast Airlines, Inc., Air Canada, Allegheny Airlines, Inc., Braniff Airways, Inc., British Overseas Airways Corp., Delta Airlines, Inc., Flying Tiger Lines, Inc., Mohawk Airlines, Inc., National Airways, Inc., New York Airways, Inc., Northwest Airlines, Inc., Ozark Airlines, Inc., Pan American World Airways, Inc., Piedmont Aviation, Inc., Airlift International, Inc., Seaboard World Airlines, Inc., Southern Airways, Inc., Trans World Air Lines, Inc., United Air Lines, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

This brief is submitted jointly by all respondents in opposition to the Petition for a writ of certiorari filed by petitioner Air Freight Haulage Co., Inc.

Questions Presented

1. Was the finding of fact by the District Court that there is no evidence to support either a *per se* violation or an unreasonable restraint of trade in violation of Sherman Act, Section 1 erroneous?

2. Was the finding of fact by the District Court that the relevant market in this case for purposes of Section 2 of the Sherman Act and Section 7 of the Clayton Act is the ground transportation of air freight to and from the metropolitan New York airports as provided by air freight forwarders, independent contractors, house truckers and the respondent, Air Cargo, Inc., erroneous?

Statement of the Case

The Facts

In the spring of 1969 the respondent, Air Cargo, Inc. ("ACI"),* commenced a search for a new trucker to replace petitioner and two other trucking companies then employed by ACI to pick up and deliver air freight enplaned and deplaned at the New York City airports (5a).** This search was prompted because, in the words of petitioner's own witness, the existing service was "far, far below standard" (5a).

In the spring of 1970 ACI awarded the new contract to respondent Ryd-Air, Inc. ("Ryd-Air") (5a). When ACI found the service provided by Ryd-Air costly and unsatisfactory, ACI terminated its agreement with Ryd-Air in

* ACI is wholly owned by the domestic airlines and is employed by them under an agreement dated March 1, 1947 (the "ACI agreement") to provide air freight pickup and delivery service, directly or by contract, at all points within the continental United States. The ACI agreement was approved by the Civil Aeronautics Board (the "CAB") on December 31, 1947 (CAB Order Serial No. E-1086) (3a, 12a). The ACI agreement is of continuing duration and is still in effect. Five amendments thereto have likewise been filed with and approved by the CAB (13a). The most recent amendment authorized ACI to extend its operations in providing pickup and delivery service for the airlines at Guam and other points outside the United States (CAB Order No. 75-6-37, dated June 6, 1975) (13a).

** References so indicated are to the opinion of the District Court as set out at pp. 3a-15a of the Petition herein.

October of 1973 (6a). Since that date ACI has provided a direct service of its own (6a).

The Findings of the District Court

Based on the evidence at the trial, the District Court made the following findings of fact:

(1) There is no evidence that the airlines, collectively, decided to terminate the service provided by the prior ACI contractors (8a);

(2) ACI was responsible both for the initial decision to replace these contractors with Ryd-Air and the subsequent decision to provide direct pickup and delivery service (8a);

(3) ACI terminated the services of the three prior contractors not out of any anti-competitive intent, but only to improve the quality of its pickup and delivery service (9a);

(4) There is no evidence that competition has lessened among suppliers of pickup and delivery service in the New York area since 1970. Competition in this market is healthy and ACI's share has actually decreased since the formation of Ryd-Air (9a);

(5) The relevant product market in this case is the ground transportation of air freight to and from the metropolitan New York airports. The testimony establishes that this service is provided, without significant differences, by air freight forwarders, independent contractors, house truckers, as well as ACI (6a); and

(6) There is no evidence that the defendants possess monopoly power in this market. The testimony on market share establishes that, during the last ten years, ACI has possessed, at most, only 10.1% of the domestic market for ground transportation of air

freight in New York's Area A and, in 1977, possessed only 5.4% of this market (10a).

The Holding of the Court of Appeals

On April 6, 1979 the United States Court of Appeals for the Second Circuit unanimously affirmed the order and judgment of the District Court "on the opinion below of the Hon Morris E. Lasker, 1978-2 CCH Trade Cas. ¶ 63,321 (S.D.N.Y. Oct. 10, 1978)" (1a-2a).

REASONS FOR DENYING THE WRIT

The Findings of the District Court, Concurred in by the Court of Appeals, Are Correct.

Contrary to the petitioner's assertions, this case does not raise any issues worthy of review by this Court.

There can be no question but that the factual findings of the District Court, unanimously affirmed by the Court of Appeals, are correct. Each finding is fully supported by the record. Nor does petitioner point to any evidence whatever to dispute the finding that there was no collective action by the airlines to terminate such service in 1969 (8a).

This Court has repeatedly stated that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 636 (1967); *International Brotherhood of Electrical Workers* v. *Foust*, —— U.S. ——, 99 S.Ct. 2121, 2124 at fn. 7 (1979). No error is shown here.

Petitioner complains in this Court, as it did in the Court of Appeals, that the District Court erred in finding that ACI acted independently of the airlines when it replaced the existing ACI contractors with Ryd-Air (Petition, p. 12).

Petitioner's argument is directly contrary to the position taken by petitioner in the District Court. Throughout the trial, petitioner had argued that there was not a shred of evidence to establish that ACI was acting as agent for the airlines or that the airlines had ratified ACI's action.*

The District Court noted petitioner's position that ACI alone was responsible for replacing the 1969 ACI contractors, stating (5a):

> "Indeed, Air Freight Haulage itself attempted to prove at trial, during the examination of Mr. Lambert (Lambert, 557) and Mr. Miller (Miller, 825), that ACI alone was responsible for replacing the earlier service in order to refute the contention of the defendants that the airlines supervised and ratified the decision and thus immunized the actions from the operation of the antitrust laws. (See *Breen Air Freight* v. *Air Cargo, Inc.*, 470 F.2d 767 (2d Cir. 1972))."

It is too late for petitioner to complain in this Court that the District Court made the finding which petitioner had urged at the trial.

Petitioner's assertions of a collective refusal to deal are not supported by the trial record. There is no evidence that any airline has refused to carry air freight brought to it for shipment by petitioner (and the record includes conduct between 1970 and the date of the trial in 1978); that any airline has refused to advance cartage charges to petitioner on air freight brought to it for shipment by petitioner; or that any airline has failed to follow routing instructions filed by a shipper specifying that petitioner was

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* At the conclusion of its case, petitioner's trial counsel stated: "Your Honor, I feel very strongly about this. There has been, and I will say it again, not one iota of evidence to talk about ratification here." (See p. 912a, Joint Appendix in the United States Court of Appeals.)

to handle the pickup or delivery of air freight for that shipper.

The testimony fully establishes, and the courts below correctly held, that the relevant product market in this case is the ground transportation of air freight to and from the metropolitan New York airports as provided by air freight forwarders, independent contractors, house truckers and ACI. As the District Court correctly noted, "ACI competes for customers with air freight forwarders, house truckers, and independent contractors . . . and . . . there is cross-elasticity of demand between ACI's services and those of the other carriers" (7a).

Finally, petitioner argues that the formation of Ryd-Air was part of a conspiracy among the airlines to fix uniform industry-wide prices to their shipping customers for the service of air freight trucking.

Petitioner attempted to inject this red-herring issue in its post-trial memorandum. The issue was not set forth in the Pre-Trial Order; nor was it one of the theories on which the case was tried. Understandably, the District Court never dealt with the issue.

Had petitioner raised its price-fixing claim in either the Pre-Trial Order or in the course of the trial, it properly would have been dismissed. Petitioner was not in the "target area" of the alleged antitrust conspiracy it claims; it therefore lacks standing. *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2 Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2 Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Kemp Pontiac-Cadillac, Inc.* v. *Hartford Automobile Dealers' Association, Inc.*, 380 F. Supp. 1382, 1386-87 (D. Conn. 1974).

Even had the alleged price-fixing agreement been an issue, the evidence would not support a claim of price fixing. It was undisputed at the trial that pricing the pickup and delivery service was essentially the same, both

before and after the organization and operation of Ryd-Air: ACI and each trucker agreed on the rates the trucker would charge ACI for its pickup and delivery service; ACI charged the airline for such services; and the airline in turn included this charge in the amount payable by the shipper or consignee under the airline tariff filed with the CAB.* As far back as 1949 the airlines agreed they would not charge shippers less than ACI charged for pickup and delivery service, and this agreement was approved and immunized by the CAB (Order Serial No. E-2679, April 1, 1949). Since that time, each airline's tariff has reflected ACI's charges to the airline pursuant to this CAB-approved agreement.

Petitioner's belated claim of price fixing is baseless.

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* The CAB long ago observed: "The rates of the airline cartage agent can now be negotiated by Air Cargo, Inc., and reviewed by the Board in the light of the competing rates of independent truckers in the area. . . ." *Local Cartage Agreement Case*, 15 C.A.B. 850, 856 (1952).

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Dated: New York, New York
August 2, 1979

Respectfully submitted,

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IN THE

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

This Reply Brief is prompted by the impact of the Ninth Circuit's opinion in *Jim Cain* v. *Air Cargo, Inc.*, 599 F.2d 316 (9th Cir. 1979), decided June 26, 1979, which reached counsel only as the Petition was at press. Additionally, several misstatements in Respondents' Brief in opposition are clarified.

1. We believe *Cain* presents a head-on conflict between the Second and Ninth Circuits in the important areas of antitrust liability and antitrust immunity by virtue of regulation by the Civil Aeronautics Board ("CAB"). Moreover, we are morally certain Air Cargo, Inc. ("ACI") will petition this Court for certiorari in *Cain* on the authority of the Second Circuit's decision in the instant case. Ironically, the leading case law model for *Cain* was the Second Circuit's holding in *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.*, 470 F.2d 767 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973). In *Cain*, Chief Judge Goodwin held:

> "In *Breen*, the ACI had refused to renew plaintiffs' contract. Instead, it awarded the sole contract for the area to a newly-formed corporation, Ryd-Air, in which ACI shared both the equity and the seats on the board of directors with a trucking competitor of plaintiffs. The Second Circuit held that the airlines' 1947 agreement did not empower ACI to organize and operate new firms, and hence that ACI was not acting as an agent of the airlines when it did so. Therefore, neither ACI nor Ryd-Air was an 'air carrier' under Section 412 and immunity did not attach. *See also Air Freight Haulage Co.* v. *Ryd-Air, Inc.*, 408 F.Supp. 446 (S.D.N.Y.1976); Note, Air Carriers—Anti-Trust Immunity, 39 J. Air L. & Comm. 453 (1973).
>
> ACI thus acted differently in *Breen* than it did in *Scroggins, Big Bear*, or *Air Freight Haulage of Puerto Rico*. In *Breen*, prior to awarding the contract, *ACI involved itself in the horizontal organization of the freight-hauling industry* by affiliating with plaintiffs' competitor to establish its own trucking firm. This distinguishes *Breen* from the other cases, where ACI was involved only vertically as the contract agent between the airlines and truckers. The cases together hold that while ACI is free to award its contracts as it will, the CAB approval under Section 412 does not extend to ACI's activities to affect the organization of the trucking industry itself. Section 414 cannot immunize conduct that is not contemplated by the agreement that the CAB approved." *Id.*, 599 F.2d at 319 (emphasis added).

Beyond the *horizontal* interference with the trucking industry decried by both *Breen* and *Cain*, it is apparent that quite a chasm exists between the concepts of the governing relevant market, implied but nowhere mentioned in *Breen*, but deemed dispositive by the District Court opinion herein:

> "The relevant product market in this case is the ground transportation of air freight to and from the metropolitan New York airports. The testimony establishes that this service is provided, without significant differences, by air freight forwarders, independent contractors, house truckers, as well as ACI" (Petition 6a).

and the conflicting premise of the Ninth Circuit's decision in *Cain*.

For in the *Cain* case, it is obvious that the Ninth Circuit's view of the relevant market contemplated trucking to and from the airport *only* of goods to be shipped by air under direct contract between an *airline* and the actual shipper (with the airlines automatically using the ACI truckers for pick-up and delivery). Nowhere does *Cain* mention the only competing *air* carriers of the airline operators, namely, the CAB-licensed air freight forwarders. Rather, *Cain* held:

> "Award of an ACI contract does not guarantee to a contractor all of the trucking business incident to *airline freight carriage*. To arrange shipment of his goods to the airport, a shipper is free to call local

carriers [truckers],* like plaintiffs, who do not have an ACI contract. *If* the shipper calls an *airline* to arrange shipment, however, *the order is routed through ACI to its designated carrier* [trucker]. When the goods arrive at the destination airport after air shipment, they will be delivered locally by the ACI carrier [trucker] at the other end, except in the *rare* case where the shipper has arranged for a different local trucker to pick up the goods in the destination city.

The ACI contract thus ensures for its holder a large volume of airport hauling. In the instant case, for example, ACI until 1975 had contracts for cartage in the closest zones surrounding Los Angeles International Airport with two truckers, City Freight and Atlantic Transfer Company ('Atlantic'). The contracts, plaintiffs assert, gave the two companies a total of almost *100 percent* of the hauling from the airport and *80 percent* of the cartage to the airport related to air shipment. The independent truckers with whom City Freight and Atlantic competed, such as plaintiffs here, together had the other 20 percent of the business going to the airport." 599 F.2d at 317-18 (emphasis added).

The Ninth Circuit did not elect to express disagreement with the instant case (footnote 8, 599 F.2d at 320). Nevertheless, the disparate elements making up the District Court's "relevant market" in this case (now adopted in the Second Circuit's affirmance), can never be reconciled with the Ninth Circuit's definition, above quoted, of that market as "trucking business incident to airline freight carriage". For into the Second Circuit's relevant market, as defined in that portion of the trial judge's opinion quoted

* The opinion used the word "carrier" interchangeably with "trucker". The bracketed equivalent is inserted for clarification.

at page 3 hereof, is jumbled 1) "air freight forwarders" who are no more "truckers" than the other *air* carriers—the airline operators—with which they compete in the two discrete submarkets for the domestic carriage of air cargo; 2) "independent contractors", meaning such non-ACI truckers as may be hired by a *shipper* to effect the pick up or delivery (whether regular or casual); 3) "house truckers", who are only part of a shipper's facilities and who cannot constitute a "market"; and finally, 4) "ACI" itself which either oversees or does *all* of that pick up and delivery service which its *airline* principals—omitted from inclusion in the "relevant market" unlike their air freight forwarder counterparts—contract to provide *as incident to their actual air carriage.* Ominously, given such usage as the Second Circuit now sanctions, "relevant market" becomes a tool for diluting illegal market restraints beyond their actual operational areas, thereby legitimizing them and putting them beyond remediation.

The Second Circuit's conception of the relevant market is not a mere finding of "fact," as respondents claim (Brief, p. 4). Rather, the determination of relevant market in this case is an ultimate conclusion of *law*, subject to this Court's scrutiny. *United States* v. *Connecticut National Bank*, 418 U.S. 656, 667 (1974). In many antitrust cases pressing for the attention of this Court, the issue of relevant market is the central *law* issue presented.

2. Respondents take the Petitioner to task for injecting "red herring" issues, which they claim were not stated in the Pre-trial Order (Brief, p. 6). That criticism comes with bad grace from parties who first raised one of the main issues of the case—relevant market—at trial, without bothering to give the notice and warning against surprise intended by pre-trial orders. In any event, Respondents' frivolous claim that the price-fixing violation was not properly raised below is belied by the explicit allegations of paragraph seventeen of the Amended Complaint and para-

graph two of the Pre-Trial Order (explicitly raising price-fixing), as well as by the trial testimony going directly to the point and also by pre-marked documentary exhibits. Indeed, when Petitioner briefed the matter in a post-hearing memorandum, Respondents did not claim surprise or lack of notice.

In keeping with Respondents' distortion of the case presented below is their attempt to mislead this Court into believing that ACI rates are submitted to the CAB for surveillance and review (Brief, p. 7n). In fact, the industry-wide rate-fixing engaged in by Respondents ACI, Ryd-Air and the airlines in 1970 was *never disclosed* to the CAB.

3. Patently, this case is more than an attempt by Petitioner to have this Court review "findings of fact by two courts below" (Respondents' Brief, p. 4). As this Court said in *United States* v. *General Motors Corp.*, 384 U.S. 127, 141n (1966), regarding a claim of group boycott under Section One of the Sherman Act,

> "We note that, as in United States v. Parke, Davis & Co., 362 U.S. 29, 44-45, the ultimate conclusion by the trial judge, that the defendants' conduct did not constitute a combination or conspiracy in violation of the Sherman Act, is not to be shielded by the 'clearly erroneous' test embodied in Rule 52(a) of the Federal Rules of Civil Procedure. . . . As in Parke, Davis, supra, the question here is not one of 'fact', but consists rather of the *legal standard* required to be applied to the undisputed facts of the case." (emphasis supplied).

We feel that the very real and serious issues in this case, viewed alone or with other antitrust cases presenting similar issues, ought to be reviewed and resolved by this

Court. We respectfully renew our prayer that a Writ of Certiorari be granted herein.

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Respectfully submitted,

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